No. 15,533

United States Court of Appeals

For the Ninth Circuit

BUILDERS CORPORATION OF AMERICA, a corporation, and HERLONG SIERRA HOMES, INC., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR THE APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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REPLY BRIEF FOR THE APPELLANTS.

CONTESTED ISSUES.

Appellee's brief is limited to the single argument that the complaint could have been dismissed on jurisdictional grounds in that the appellants sought recovery for damages resulting from "interference with contract rights" and that subsection 2680(h) of the Federal Tort Claims Act (Title 28 U.S.C.) precludes recovery on such a cause of action. Appellee does not argue that the complaint could or should have been dismissed on the ground that the cause of action involved a "discretionary function"—the basis upon which appellee sought to dismiss the action in the District Court. Appellee makes two claims which are not supported by the record: (1) that the complaint

seeks recovery "of lost rental profits," and (2) that the claim is founded on misrepresentation. We shall show in the following discussion why these claims are unfounded.

SUMMARY OF ARGUMENT.

1. The tortious conduct complained of falls within the ambit of tort actions for which recovery may be had under the Federal Tort Claims Act (Title 28 U.S.C. Sections 1346 (b), 2671-2680).

A. The complaint alleges a duty on the part of the Appellee, a breach of such duty, and damages resulting from the breach.

B. The action brought by appellants seeks recovery for damages to property, not lost rental income.

ARGUMENT.

1. THE TORTIOUS CONDUCT COMPLAINED OF FALLS WITHIN THE AMBIT OF TORT ACTIONS FOR WHICH RECOVERY MAY BE HAD UNDER THE FEDERAL TORT CLAIMS ACT (Title 28 U.S.C. Sections 1346 (b), 2671-2680).

A. The complaint alleges a duty on the part of the appellee, a breach of such duty, and damages resulting from the breach.

A proper understanding of the nature of the action brought by appellants requires a brief recapitulation of the unusual facts in this case.

Appellants, in constructing the dwelling units, had agreed to reserve the rental units for the exclusive use of military and civilian personnel employed at

the Sierra Ordnance Depot. On January 23, 1954, and again on June 24, 1954, the Department of Defense issued certain directives and orders which were to be implemented by the employees of appellee. The complaint charges that the employees either wilfully or negligently failed to implement these orders. It is true that the complaint alleges certain misrepresentations made by the employees, but as alleged in the complaint, these misrepresentations were offered by the employees as *justification* for not carrying out the orders, and were not alleged as the basis of the action. The basis of appellants' action is the failure or refusal—wilful or negligent—of the appellee to carry out the orders to the damage to the appellants. The principal question is, then, whether the issuance of these orders created a duty on the part of the appellee which required the use of ordinary care in its fulfillment? We hold to the opinion that the answer to this question must be an unequivocal "yes".

We have alluded to the fact that appellants were required to reserve the units for the exclusive use of the personnel at the Sierra Ordnance Depot. The record shows, additionally, that the depot is located in an isolated and desolate area. The purpose of the orders of January 23 and June 24, 1954, was to accomplish a definite objective—availability of tenants. Unless such orders were implemented the tenants would not be available. We may agree that the Appellee was under no duty to promulgate such orders, but once it had done so, there was a duty to fulfill them properly. At the very least, the issuance of

these orders constituted a voluntary assumption of a duty which, once affirmatively assumed, required the exercise of reasonable care in its discharge. *Valdez v. Taylor Automobile Co.* (1954), 129 C.A. 2d 810, 278 P. 2d 91; *Johnston v. Orlando* (1955), 131 C.A. 2d 705, 281 P. 2d 357; *Hayes v. Oil Co.* (1952), 38 Cal. 2d 375, 384, 240 P. 2d 580. As pointed out in *Valdez*:

> ". . . It is well established that a person may become liable in tort for negligently failing to perform a voluntary assumed undertaking even in the absence of a contract to do so. A person may not be required to perform a service for another but he may undertake to do so—called a voluntary undertaking. In such a case the person undertaking to perform the service is under a duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence . . ."

The case at bar is akin to those cited in the principal brief refuting the argument that a discretionary function was involved. In *Hernandez v. United States* (1953), 112 Fed. Supp. 369, the United States *voluntarily assumed* the duty of erecting a road block. Once it assumed this duty, it was obligated to discharge it properly. So, also, in *Somerset v. United States* (1951), 193 Fed. (2d) 631, the United States *voluntarily assumed* the duty of marking the wreck. Here, again, it became charged with the duty of properly discharging that duty. See also the other cases cited under Point 4 in the principal brief. In short, if the complaint were stripped of all allegations except those relevant to the issuance of the orders,

the wilful or negligent failure to implement these orders, and the damages resulting therefrom, a good cause of action would have been alleged under the law of California, as well as under the decisions of the Federal Courts pertaining to the interpretation of the Federal Tort Claims Act.

B. The action brought by appellants seeks recovery for damages to property, not lost rental income.

Appellee argues emphatically that the damages involve loss of rental income. The record discloses that appellants invested $2,975,000 in the property, of which $2,375,000 was in mortgage loans and $600,000 was in capital of appellants expended or obligated by them in the construction of the project. This investment has been, to a large extent, lost. It is the loss of this investment which represents the damages to appellants and which resulted from the wilful or negligent failure of appellee to properly discharge its duty. Reasonable men would have realized that failure to implement the orders of January 23 and June 24, 1954, would result in this loss, as well as losses in rental income.

The allegation in Paragraph II of Count II reads:

> "That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued as aforesaid, and carelessly and negligently failed and refused to initiate or implement any program to

assure maximum occupancy of the dwelling units constructed by plaintiffs, and carelessly and negligently failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of the Sierra-Ordnance Depot; and carelessly and negligently failed and refused to demolish any of the temporary and substandard housing; and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate government housing not later than September 1, 1954."

We believe this allegation conclusively establishes that the cause of action is not based on "interference with contract rights".

CONCLUSION.

We renew our contention that the judgment should be reversed and remanded with directions to overrule the motion to dismiss and to require the defendant to plead.

Dated, Sacramento, California,
August 9, 1957.

Respectfully submitted,
LANDIS, BRODY & MARTIN,
Attorneys for Appellants.